E/2009/45
E/C.18/2009/6

United Nations

Committee of Experts on International Cooperation in Tax Matters

Report on the fifth session (19-23 October 2009)

Economic and Social Council
Official Records, 2009
Supplement No. 25

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(19-23 October 2009)

United Nations • New York, 2010

Note

Symbols of United Nations documents are composed of capital letters combined with figures.

Summary

The present report contains the conclusions and recommendations of the fifth session of the Committee of Experts on International Cooperation in Tax Matters, held at the United Nations Office at Geneva from 19 to 23 October 2009. The Committee, which was established by the Economic and Social Council by its resolution 2004/69, consists of 25 experts appointed in their personal capacity for a four-year period. The Committee dealt with the following substantive items: (a) definition of permanent establishment; (b) taxation of services, including royalties and technical fees: policy and technical issues; (c) attribution of profits under article 7 of the United Nations Model Double Taxation Convention between Developed and Developing Countries; (d) taxation of development projects; (e) tax competition in corporate tax: tax incentives that have worked and not worked in attracting foreign direct investment; (f) the proposed United Nations code of conduct on cooperation in combating international tax evasion and avoidance; (g) revision of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries; (h) how treaties are developed: practical issues; (i) dispute resolution; (j) general issues in the review of Commentaries of the United Nations Model Double Taxation Convention between Developed and Developing Countries; and (k) transfer pricing, including a manual and checklist for developing countries.

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Chapter I
Introduction

1. Pursuant to Economic and Social Council resolutions 2004/69 and 2008/16, the fifth session of the Committee of Experts on International Cooperation in Tax Matters was held in Geneva from 19 to 23 October 2009.

2. The fifth session of the Committee of Experts was attended by 24 experts and 63 observers. The following members of the Committee of Experts attended the session: Bernell L. Arrindell (Barbados), Claudine Devillet (Belgium), Marcos Aurelio Pereira Valadao (Brazil), Iskra Georgieva Slavcheva (Bulgaria), Liselott Kana (Chile), Tizhong Liao (China), Amr El Monayer (Egypt), Wolfgang Lasars (Germany), Kwame Adjei-Djan (Ghana), Anita Kapur (India), Enrico Martino (Italy), Keiji Aoyama (Japan), Mansor Hassan (Malaysia), Armando Lara Yaffar (Mexico), Noureddine Bensouda (Morocco), Robin Moncrieff Oliver (New Zealand), Ifueko Omoigui-Okauru (Nigeria), Stig Sollund (Norway), Farida Amjad (Pakistan), Sae Joon Ahn (Republic of Korea), El Hadji Ibrahima Diop (Senegal), Ronald Van der Merwe (South Africa), Jürg Giraudi (Switzerland) and Henry John Louie (United States of America).

3. The session was also attended by observers for Argentina, Australia, the Bahamas, Belarus, Belgium, Brazil, Canada, Chile, Cyprus, the Czech Republic, Denmark, France, Ireland, Italy, Kenya, Kuwait, Latvia, Lesotho, Luxembourg, Malaysia, Monaco, Morocco, the Netherlands, Nigeria, Norway, Panama, Qatar, Saudi Arabia, Senegal, Singapore, Spain, Switzerland, Thailand, Turkey and the United Kingdom of Great Britain and Northern Ireland.

4. Observers from the following intergovernmental organizations were also present: European Commission, International Monetary Fund (IMF) and Organization for Economic Cooperation and Development (OECD).

5. The following other entities were also represented: Bournemouth University, Confédération Fiscale Européenne, International Association of University Presidents, International Bureau of Fiscal Documentation, International Chamber of Commerce, New Rules for Global Finance Coalition, St. Thomas University, Tax Justice Network, Universidad Complutense de Madrid, University of Indonesia, University of Lodz and World Association of Former United Nations Interns and Fellows. Others participated in their personal capacity.

6. The agenda and documentation for the fifth session were as follows:

1. Opening of the session by the representative of the Secretary-General (E/C.18/2009/4).
2. Election of the Chair and the Rapporteur of the Committee and other officers.
3. Consideration of the rules of procedure and other organizational issues.
4. Introductory remarks by the Chair of the Committee.
5. Adoption of the agenda and organization of work (E/C.18/2009/1).
6. Discussion of substantive issues related to international cooperation in tax matters:

(a) Definition of permanent establishment (E/C.18/2009/CRP.1);

(b) Taxation of services, including royalties and technical fees: policy and technical issues (E/C.18/2009/CRP.4);

(c) Attribution of profits under article 7 of the United Nations Model Double Taxation Convention between Developed and Developing Countries (E/C.18/2009/2);

(d) Taxation of development projects;

(e) Tax competition in corporate tax: tax incentives that have worked and not worked in attracting foreign direct investment;

(f) Proposed United Nations code of conduct on cooperation in combating international tax evasion and avoidance (E/C.18/2009/CRP.2);

(g) Revision of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (E/C.18/2009/CRP.3 and E/C.18/2009/CRP.3/Add.1);

(h) How treaties are developed: practical issues (E/C.18/2009/3);

(i) Dispute resolution;

(j) General issues in the review of commentaries of the United Nations Model Double Taxation Convention between Developed and Developing Countries (E/C.18/2009/CRP.5);

(k) Transfer pricing, including a manual and checklist for developing countries (E/C.18/2009/5).

7. Dates and agenda for the sixth session of the Committee.

8. Adoption of the report of the Committee on its fifth session.

Chapter II
Organization of the session

A. Opening of the session and election of officers

7. On 19 October 2009, the fifth session of the Committee was opened on behalf of the United Nations Secretary-General by Manuel Montes, Secretary of the Committee, pending the election of a Chair. In his opening remarks, Mr. Montes outlined the history and objectives of the United Nations Committee of Experts on International Cooperation in Tax Matters and the Organization's tax work more generally and noted the increasing emphasis on the role of tax cooperation in promoting development and the increased focus on, and expectations as to the work of, the Committee. The current global crisis had emphasized the importance of such cooperation. He emphasized in particular the Committee's unique status as a body in which both the developing and developed countries' interests were fully represented, and the special development focus in its mandate. He noted that a personal commitment was required by each Committee member to work effectively between annual sessions, and to engage in the work of the subcommittees. Mr. Montes noted the continuing budgetary constraints to the Organization's tax work, but assured the Committee that the Secretariat would continue to be creative and results-oriented in seeking to address that issue while ensuring sufficient developing country participation.

8. Armando Lara Yaffar was then elected as Chair of the Committee for a renewable two-year term. First, second and third Vice-Chairs were also elected in that meeting. Tizhong Liao was elected as first Vice-Chair, Anita Kapur as second Vice-Chair, and Henry Louie as third Vice-Chair, all for renewable two-year terms also. Liselott Kana was elected as Rapporteur for the fifth session.

B. Adoption of the agenda and organization of work

9. The Chair expressed particular appreciation to the previous Chair, Noureddine Bensouda, for his work and achievements in that role over the past four years. He also indicated the results of the closed session. He noted the importance of having the Committee prioritize tasks, so as to accomplish its broad mandate in the most effective and efficient way possible. He reported that the Committee had regarded the most urgent issue before it to be the revision of the United Nations Model Double Taxation Convention between Developed and Developing Countries,[1] which the Committee had targeted to be completed by 2011. The second most pressing issue was the preparation of a practical manual on transfer pricing for developing countries. There were other issues that the Committee regarded as very important to meeting its mandate, as reflected in the formation of nine subcommittees, to be led as follows:

1. United Nations Model Convention update: Coordinator — Robin Oliver
2. Tax treatment of services: Coordinator — Liselott Kana
3. Exchange of information: Coordinator — Robin Oliver

[1] United Nations publication, Sales No. E.01.XVI.2.

4. Dispute resolution: Coordinator — Claudine Devillet

5. Transfer pricing practical issues: Coordinator — Stig Sollund

6. Revision of the Manual for the Negotiation of Bilateral Tax Treaties: Coordinator — Bernell Arrindell

7. Article 14 of the United Nations Model Convention: Coordinator — Liselott Kana

8. Capacity-building: Coordinator — Ifueko Omoigui-Okauru

9. Capital gains: Coordinator — Tizhong Liao

10. The Committee agreed on the terms of reference of each of its subcommittees and working groups, as well as on some procedural aspects in relation to them as posted on the Financing for Development website at http://www.un.org/esa/ffd/tax/fifthsession/SubcommitteesMandates.pdf.

Chapter III

Discussion and conclusions on substantive issues related to international cooperation in tax matters

A. Definition of permanent establishment

11. Stig Sollund (coordinator of the previous Subcommittee on the Definition of Permanent Establishment) presented document E/C.18/2009/CRP.1 on the definition of "permanent establishments". He noted that at its fourth annual session, the Committee had decided that, in view of the differing views about whether article 14 should be deleted, it was appropriate to maintain article 14 in the United Nations Model Convention, but also to provide an alternative for those countries which would like to delete article 14 and have situations addressed by it dealt with instead by articles 5 and 7.

12. Mr. Sollund noted that what was now, therefore, at stake was what article 5 should look like for those wishing to delete article 14. Those who wanted to retain article 14 had already had their concerns addressed by the decision of the Committee noted above. The issue of whether article 14 should be improved would be separately considered by the Subcommittee on that article.

13. Mr. Sollund outlined the proposal in the paper to create a new alternative article 5 (b), with the current article 5 being retained as article 5 (a). While most of the discussion related to the proposed article 5 (b), there were three clarificatory changes proposed in the paper, regardless of whether article 14 was deleted (in other words, whichever of article 5 (a) or 5 (b) was adopted). These were:

(a) The introductory portion of paragraph 2 of article 5 would read "The term 'permanent establishment' includes", not "The term 'permanent establishment' includes especially", as at present.

(b) The introductory portion of paragraph 3 of article 5 would read "The term 'permanent establishment' also includes", rather than "The term 'permanent establishment' also encompasses", as at present.

(c) Subparagraph 3 (b) of article 5 would read: "but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any twelve-month period commencing or ending in the fiscal year concerned", rather than "but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any twelve-month period", as at present.

14. It was noted that the proposed amendments before the Committee had been placed before the previous members of the Committee in June 2009 under the "written procedure", but that agreement had not been reached on the changes, although there had been no objection to the change from a reference to "six months" in subparagraph 3 (b) to a reference to "183 days".

15. Following Mr. Sollund's presentation, there were further discussions on the proposed amendments. It was suggested that the existing structure of article 5 should be followed more closely and it was noted that the inclusion of the phrase

"Notwithstanding the preceding provisions of this article", at the beginning of current paragraph 7 might unintentionally alter the operation of that paragraph.

16. The Committee discussed the proposals further in the closed session and, on the last day of the annual session, Mr. Sollund reported back to the Committee with suggested modifications to the original wording of the article.

17. **It was agreed by members that the introductory portion of paragraph 2 would continue to read "The term 'permanent establishment' includes especially" and that the introductory portion of paragraph 3 would continue to read "The term 'permanent establishment' also encompasses".**

18. **Members further agreed that subparagraph 3 (b) would be amended to read: "but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any twelve-month period commencing or ending in the fiscal year concerned", rather than "but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than six months within any twelve-month period", as at present. It was also decided that the commentary on article 5 would include a possible form of wording for those wishing to delete article 14, as follows:**

The term 'permanent establishment; also encompasses:

(a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;

(b) The furnishing of services by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or connected project) within a Contracting State for a period or periods aggregating more than 183 days within any twelve-month period commencing or ending in the fiscal year concerned;

(c) For an individual, the performing of services in a Contracting State by that individual, but only if the individual's stay in that State is for a period or periods aggregating more than 183 days within any twelve-month period commencing or ending in the fiscal year concerned.

19. **This proposal was agreed to by the Committee, although it was recognized that treating subparagraph 1 (b) of article 14 as only applying to individuals would render subparagraph 3 (c) (as finalized above) as being explicitly confined to individuals. The wording adopted by the Committee reflected a view expressed in paragraph 9 of the commentary on article 14 (to the effect that article 14 deals only with individuals). Some countries did not hold to that view and it was agreed that this would be noted in appropriate form in the commentary on article 5. It was recognized that, in this and other aspects of the United Nations Model Convention, changes to other articles (in particular article 14) in the future would, of course, require consequential amendments for the 2011 update.**

B. Taxation of services, including royalties and technical fees: policy and technical issues

20. Liselott Kana, coordinator of the former Subcommittee on Article 14 and Taxation of Services, and now of the two Subcommittees dealing with the respective parts of its mandate, introduced document E/C.18/2009/CRP.4. Given that article 14 would be retained in the next version of the United Nations Model Convention, and given that there was a recognition that there were some issues with its current drafting, the former Subcommittee referred to above had been established in 2008 with the aim of examining in more detail those issues and possible solutions. The paper presented reflected an initial stage of such examination.

21. The difficulties with regard to article 14 were discussed:

(a) *Coverage of activities other than the furnishing of professional services*. The main problem in this regard was that the current article 14 included in its wording the phrase "other activities of independent character", which was neither defined in the United Nations Model Convention nor explained by the commentaries;

(b) *Uncertainties over scope*. The issue of personal scope had been largely discussed in the context of the work on the definition of permanent establishment over the past years. The text of article 14 in the United Nations Model Convention used the term "resident" which, on its face, included a person that was an individual or a company; however, the commentary on article 14 only referred to individuals, and this ambiguity had resulted in different interpretations by countries as to the coverage of article 14;

(c) *Difficulties in applying article 14 due to diverging interpretations of the term "fixed base"*. The current commentaries pointed out that the term "fixed base" was analogous to "permanent establishment". However, some participants indicated that they made some distinctions between the two terms;

(d) *Deduction of expenses by a fixed base*. The United Nations commentaries referred to the OECD commentaries and pointed out that the deduction of expenses by a fixed base must be allowed under article 14. However, this possibility was not explicitly mentioned in the text of article 14 — which in some countries created problems of interpretation. In this respect there was often a problem in civil law countries that common law countries might not have.

22. Bearing in mind the aforementioned areas of difficulty, Ms. Kana noted that the discussion on proposals to improve article 14 should usefully focus on those issues.

23. Ms. Kana referred to the questionnaire annexed to document E/C.18/2009/CRP.4 and asked country representatives to complete it and return it to further inform the discussion.

24. She noted that there were many diverging interpretations and approaches on the subject of taxation of services and that there should be a broad accommodation by putting together different options in the main text or in the commentaries, and carefully explaining their implications, in order to reflect the reality of different countries and make the United Nations Model Convention as practically useful and relevant as possible.

25. During the discussions, some participants rejected the idea of providing a definition for fixed base, and making a distinction between the terms "fixed base" and "permanent establishment". A number of participants expressed the view that the topic of "taxation of services" should not be dealt with under the same Subcommittee as article 14, and, as noted above, the Committee had decided that two different Subcommittees would be created: one on article 14, and another one on the taxation of services (including fees for technical services), and that both groups would be chaired by Ms. Kana in view of the interaction between those issues.

26. **It was agreed that the Subcommittee dealing with article 14 would restrict its activities to the drafting of a revised article 14, together with text for the commentaries on that article and ensuring coherence with the commentary on article 5. The Subcommittee on Taxation of Services would examine services issues, including fees for technical services. The article 14 Subcommittee would aim to have a final report by 2011, so that any changes could be incorporated in the next version of the United Nations Model Convention. The Subcommittee on Taxation of Services would aim to have an initial report for the next Committee meeting and would have a final report before the terms of current Committee members ended in 2013.**

C. Attribution of profits under article 7 of the United Nations Model Double Taxation Convention between Developed and Developing Countries

27. Robin Oliver introduced document E/C.18/2009/2. He noted that, as a result of discussions at the fourth session of the Committee, he had been asked by the Committee to submit a short paper to the fifth session outlining recent developments at OECD with respect to article 7 of the OECD Model Tax Convention on Income and on Capital and the potential impact on the United Nations Model Convention.

28. Mr. Oliver noted that OECD had carried out a significant amount of work in this area. It had incorporated a revised commentary on article 7 in its 2008 update. It was expected that a new article 7 would be incorporated into the 2010 update, based on the OECD report on the attribution of profits to permanent establishments of 2008.[2]

29. The presentation concluded that the revised OECD commentary on article 7 was based on the existing article 7 and introduced no significant changes that would have an effect on the similar article 7 in the United Nations Model Convention. Mr. Oliver expressed the view that the proposed new article 7 would introduce significant changes conflicting with article 7 of the United Nations Model Convention. The new proposed OECD article 7 would require permanent establishments to be treated as fictional or notional separate legal entities, with assets, capital and liabilities allocated between branches and head offices largely on the basis of "significant people functions".

30. In particular, deductions would be provided for notional payments of royalties and interests and profit margins allowed for services provided by head offices for

[2] OECD, 2008; available from www.oecd.org/dataoecd/20/36/41031455.pdf.

branches. The proposed OECD Model Tax Convention would not, however, allow for the levying of withholding tax on such notional payments.

31. The new OECD article 7 was therefore seen as having the potential to change the balance between source and resident taxation, contrary to the interests of many developing countries. It was also explicitly contrary to paragraph 3 of the article of the United Nations Model Convention, which did not allow deductions for such notional payments (although banks were treated as a special case in the case of notional interest).

32. Four options for the Committee to move forward were outlined: (a) adopt the proposed OECD approach as outlined in the OECD 2008 report; (b) not consider or refer to these developments in the next United Nations update; (c) rewrite extensively the existing United Nations commentary in light of these developments; or (d) take a minimalistic approach to changes to the commentary on article 7 of the United Nations Model Convention while noting explicitly that the Committee had not adopted the approach set forth in the OECD report.

33. Some participants expressed support for the OECD revision to the commentaries on article 7 of the OECD Model Tax Convention and to article 7 itself, expressing the view that all the OECD revision did was to take more seriously the principles that were already present in article 7. These participants did not agree that the changes shifted the balance of source and residence taxation in treaties and felt that the OECD work would give greater certainty to the attribution of profits, to the benefit of administrations as well as taxpayers and their advisers.

34. In the course of the discussions it was agreed that, regardless of the approach that was right for the OECD Model Tax Convention, the Committee should not adopt the approach to article 7 outlined in the OECD 2008 report as relevant to the United Nations Model Convention (option (d) above). This was because it was in direct conflict with paragraph 3 of article 7 of the existing OECD and United Nations Model Conventions, which generally disallowed deductions for amounts "paid" (other than towards reimbursement of actual expenses) by a permanent establishment to its head office. That rule was seen as continuing to be appropriate in the context of the United Nations Model Convention, whatever changes were made to the OECD Model Tax Convention and commentaries.

35. It was agreed that a minimalistic approach to drafting changes to the article 7 commentary should be included in the next update and that it should be noted that the Committee had not viewed the approach in the OECD 2008 report as relevant to the United Nations Model Convention. That update should also include a short statement as to why the United Nations Model Convention varied from the new OECD approach. The paper presented by Mr. Oliver was referred to the Subcommittee on the Negotiation Manual for inclusion in the revised Manual for the Negotiation of Bilateral Tax Treaties.

36. The Chair thanked Mr. Oliver for his work and for clearly explaining this very difficult issue, and noted that the Working Group on article 7 led by Mr. Oliver would work on the proposed "minimalist revision" of the commentary.

D. Taxation of development projects

37. Jacques Sasseville referenced the 2006 paper (E/C.18/2006/5) and the 2007 paper (E/C.18/2007/CRP.12) on this topic. The first of these documents summarized current practice in the taxation of foreign project assistance. It argued for a reconsideration of any assumption that donors should seek tax exemption in the recipient countries for the projects that they financed. It proposed developing guidelines towards a more coordinated approach that countries would be free to adopt. The 2007 document included a set of draft guidelines that could be used to consult with all stakeholders, including donor agencies. No paper had been prepared for discussion in 2009, as the presentation represented an update.

38. Mr. Sasseville explained that, while it had proved very difficult to invite all the stakeholders to meet to discuss these issues and that the meeting proposed at the 2008 session had still not occurred, it was significant that the issue had been picked up by the African Tax Administration Forum. One of the issues they would discuss with donors was the taxation of development projects and the role of tax exemptions in attracting foreign direct investment. The goal was to convene a meeting between representatives from Government and donor agencies (in the beginning of 2010) to discuss these often sensitive issues.

39. Following Mr. Sasseville's presentation, members and participants contributed to the discussion, some mentioning that donor agencies needed to take more account of the externalities of their decisions in seeking tax exemptions.

40. **The Committee agreed that this was an important issue, as the effect of large projects falling outside the tax system was especially significant for developing countries, and noted that it would welcome further updates from Mr. Sasseville, Mr. Thuronyi and others involved in this work.**

E. Tax competition in corporate tax: tax incentives that have worked and not worked in attracting foreign direct investment

41. The Secretary of the Committee, Mr. Manuel Montes, presented this issue to the Committee and urged members to analyse the extent to which tax incentives had been successful. Mr. Montes indicated that the Secretariat would draft a paper dealing with this topic for analysis and discussion by the Committee at its sixth session.

42. Mr. Montes further mentioned that current discussions on the regulation of financial markets might develop into a new area of attention for the Committee, consistent with its mandate. He noted that tax competition on factoring activities, competing financial centres and tax incentives provided for those centres would all be relevant issues in that respect.

43. The Deputy Secretary of the Committee, Michael Lennard, informed the Committee that the United Nations could have a paper ready within approximately the next six months. The paper should be focused mainly on a specific region in order to draw regional lessons of wider application.

44. During the discussions, many of the participants highlighted the political aspect of tax incentives, a practice that was frequently detached from the tax administration. An incentive was usually granted under the expectation that the

foreign investor would capitalize and bring more investments into the country, which might or might not actually happen. The negotiation often happened at a level which escaped tax budgetary considerations.

45. Tax sparing was cited as an example of a practice that was generally no longer supported by developed countries and was less commonly proposed by some developing countries than in the past. The view was put that by refusing to agree to tax sparing in tax treaties, the developed country was in fact capturing for itself the benefit granted by the developing country in reducing taxes to encourage investment.

46. Most of the participants supported the preparation of a paper, concluding that it would need to reflect the variety of experiences of different countries. Many of the countries contributed to the discussions by outlining their own home countries' experiences. Although some countries had chosen to end tax incentives, foreign direct investment had increased markedly, demonstrating that tax incentives were not the main reason for foreign investment. Others noted developments in regional groupings for exchanging tax incentive information as a way of improving practices in the area.

47. **The Committee concluded that it would be useful to see how different regions in the world could coordinate their approaches to tax incentive issues and share experiences. It was agreed that there was a need for further discussion of the topic at the Committee level. The Committee decided that the United Nations Secretariat would prepare a paper on this issue that would portray the literature on the subject and identify other issues that could be looked at by the Committee. The paper would be submitted to the Committee for discussion at its sixth annual session.**

F. Proposed United Nations code of conduct on cooperation in combating international tax evasion and avoidance

48. Robin Oliver was not a member of the previous Subcommittee on Exchange of Information, which had examined the code of conduct, but nevertheless agreed to the Chair request that he present the Subcommittee's paper on the proposed code of conduct (E/C.18/2009/CRP.2) in the absence of Miguel Ferre, who had been Coordinator of that Subcommittee in its work examining the issue.

49. As background, it was explained that the Committee had decided to develop a code of conduct on cooperation in combating international tax evasion. A draft had been discussed at the 2008 meeting and a technical working document on a proposed code had been released for the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus held in December 2008.

50. Since then, the Subcommittee on Exchange of Information had worked on further developing the draft code. Annex 1 of the group's working document contained the proposed text of the code of conduct, as drafted by Mr. Ferre, following Subcommittee discussions. As noted in Mr. Ferre's paper, there had not been unanimity in the Subcommittee: one member of the Subcommittee considered that the code was overly based on article 26 and should be more "ambitious".

51. Mr. Oliver gave his endorsement to the coordinator's draft, though he acknowledged that some fine-tuning was necessary. He suggested that the Committee should aim to agree on a draft code at the fifth session — a goal that was ultimately met. It was explained that the Committee itself would not adopt the code. Instead, it would be recommended to the Economic and Social Council for adoption in appropriate form. In practice, the likely process for taking the matter forward would be that some countries would draft a resolution supporting the code in appropriate form and that would be discussed in the Council.

52. Mr. Oliver noted that the code would, if adopted at State level, constitute a commitment to:

(a) Effectively exchange information in both criminal and civil tax matters;

(b) Ensure there were no restrictions on information exchange caused by application of the dual criminality principle or a domestic tax interest requirement;

(c) Establish appropriate confidentiality rules for information exchanged and safeguards and limitations that applied to taxpayer information;

(d) Ensure that reliable information was available: in particular, bank account, ownership, identity and relevant accounting information, with powers in place to obtain and provide such information in response to a specific request.

53. There was a wide-ranging discussion on the proposed code and it was agreed that the use of concepts such as "standard", "principle", "automatic" and "spontaneous" exchange of information would need to be refined. There was agreement by most that the Committee should recommend a draft code along the lines proposed. However, a number of drafting issues were highlighted and changes made to the draft. A distinction should be made between what the code currently set as a minimal level of international cooperation, on the one hand, and what should be aspired to in the future, on the other.

54. There was discussion about what level of cooperation should be sought for in such a document. Some considered that the code should mandate "automatic" exchange of information to make a strong statement against tax evasion, and to assist developing countries, which might have trouble achieving the level of knowledge needed to make a request for exchange of information, such as bank account details. Others noted the potential burden of an over-use of automatic exchange, including the logistical issues in achieving effective automatic exchange of information and in analysing information that was received, and suggested that automatic exchange was only one of many ways of exchanging information.

55. The result was to affirm in the code a minimal level of international cooperation that all jurisdictions, including developing countries, would currently be able to meet, but to aspire towards a higher level of cooperation as a jurisdiction's circumstances allowed.

56. Another issue was the code's coverage, i.e. whether the code should extend to tax avoidance as well as to tax evasion. Some participants argued that only addressing tax evasion reduced the relevance of the code in the real world, where the boundaries between tax evasion and tax avoidance were blurred, and this limited coverage could make it harder, rather than easier, to combat sophisticated tax avoidance schemes that exploited such "blurred distinctions".

57. **The code of conduct was approved by the Committee in the form provided in the annex to the present report. The Chair was also mandated to present this version to the Economic and Social Council in an appropriate form. The Chair thanked Mr. Oliver for presenting a complex issue so ably at short notice, and thanked also the Subcommittee and its coordinator, Mr. Ferre, for their efforts. He also thanked the participants for all their valuable insights, which had contributed to succeeding in the ambitious task of finalizing the code at the session.**

58. **On broader issues relating to the exchange of information, the developments in relation to the Global Forum on Tax Transparency and Exchange of Information were noted, and the Committee agreed that the United Nations Secretariat might usefully participate as an observer in the Global Forum and that the Secretariat should liaise in the first instance with the Chair on how most appropriately to take forward this suggestion. The Subcommittee on Exchange of Information would monitor developments in the Global Forum.**

G. Revision of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries

59. Stephen Crow presented the main points of the issues discussed in document E/C.18/2009/CRP.3, noting that Frank Brunetti, who had coordinated the Subcommittee, had been unable to attend the meeting. During his presentation, Mr. Crow emphasized the importance of having a Manual that was as practical and useful as possible.

60. Mr. Crow noted that in the past, the United Nations Model Convention had been geared towards people who had a certain level of expertise. He argued that this might not be the target audience for the Manual any more, as the Manual aimed to engage as many developing nations as possible. Mr. Crow asked the Committee to provide some basic guidelines on what they considered should be included in the appendix proposed in the document, and provided some examples of what he thought should be included in such an appendix.

61. Most of the presentation dealt with the scientific method to be adopted when preparing the Manual and the guidelines for the United Nations Model Convention. Mr. Crow was in favour of a scientific approach, with a peer review panel, in an attempt to adopt a procedure that was similar to the way academic articles were prepared. The submission of articles would be transparent. He suggested that the decision to include or reject submissions would be done through a panel review process. He suggested that the peer review panel should be composed of a few Committee members and some observers. The peer review panel's function would be to endorse a proposed inclusion or not, and to decide whether or not a paper should be brought to the attention of the Committee. The panel would not be responsible for the approval or rejection of an article in its entirety. They would constitute a first filter, to be reviewed by the Committee and the review panel and then sent for resolution. A timeline would be provided to ensure sufficient consideration before the relevant annual session.

62. The Chair opened the discussions, reiterating that the Manual should neither be a repetition of the United Nations Model Convention, nor simply a compilation

of the documents that did not fit into the commentaries. Mr. Crow noted that there was a common understanding that the United Nations Model Convention, its commentaries and the Manual should be drafted to be interrelated with each other, integrated and form a correlated whole. A Manual that met this criterion should include negotiation techniques (political, juridical analysis, formation and policy); application and interpretation of tax treaties (including the principles of the Vienna Convention on the Law of Treaties); and individual but brief reports on particular issues arising from the Committee's deliberations. If the submitted reports were lengthy, the Committee should seek to include only a summarized version of them and refer the reader to the whole report on a United Nations website.

63. Mr. Crow noted that the Manual might also contain other references to the United Nations website, thus making the final Manual a more concise document. The commentaries should contain interpretation materials directly relating to the text of relevant articles, whereas the Manual should contain useful materials that would provide guidance for inexperienced treaty negotiators. Additionally, the Manual should be as neutral and atemporal as possible, so that there would be no need for constant revision. Although there might be references to other sources and Internet-based materials, it should strive to become a self-standing document.

64. There were several comments made on this approach. Members and representatives expressed concern that the appendix to the Manual should not become too large or put forth views that diverged from established principles of the United Nations Model Convention or commentaries. It was explained that the selection process was designed to limit acceptance of significant contributions and to favour use of abstracts that provided references to the full papers. The principles and guidelines were both designed to preclude the selection of papers that would express divergent views.

65. Another enquiry related to the availability of the Manual and appendix online. The Secretariat clarified that the issue of whether to have virtual or printed documents was discussed at the fourth session, as reflected in paragraph 74 of the Committee's report on the fourth session. The Secretariat noted that a print version of the Manual was required, as Internet access in all countries and circumstances could not be taken for granted. Nevertheless, the use of hyperlinks would be especially useful for such a document and it could be updated more readily electronically, so that electronic availability would need to be explored, subject to the usual resourcing constraints. It was noted by the Secretariat that the main problem with having an Internet web page was the associated cost and resource aspects, especially in providing a translation for all the documents posted on the website, in all of the six United Nations official languages.

66. Some participants expressed the view that it was premature to discuss the appendix before the preparation of the Manual. Mr. Crow noted that the parameters of the Manual had been approved at the fourth session in 2008, so that there was sufficient basis to consider the appendix. Other participants doubted whether the academic peer review process proposed in the paper was necessary or appropriate. Most documents, in their view, would go online, and would not need such a strict peer review approach.

67. John Bischel then presented a paper on basic approaches to tax treaty negotiation (E/C.18/2009/CRP.3/Add.1). He noted that the paper discussed the basic issues that a new treaty negotiator might expect to encounter in negotiating the first

10 articles of a treaty. Mr. Bischel sought to provide a historical as well as a practical presentation of the issues involved when negotiating a treaty and indicated that a final version of the paper could be provided by the sixth session. He noted that the paper should be seen as a work in progress, to be contributed to, commented on and improved on by the members of the Committee.

68. The subject drew various comments. Some of the members considered that a more in-depth analysis of the different subjects addressed by the paper was needed. Others supported the overview of subjects, stating that the objective would be to flag danger areas for new negotiators, especially in terms of giving up source taxation rights under the treaty without realizing it or understanding the implications.

69. One of the main areas of discussion was with respect to the analytical framework provided by the paper: all the issues discussed in the paper started with an analysis of the OECD Model Tax Convention to only then move to analysis of the United Nations Model Convention. It was argued that the focus should be on the United Nations Model Convention and therefore the formulation of the text should be changed. Furthermore, the Manual should reflect the revision of the United Nations Model Convention scheduled for 2011.

70. There was also a thorough discussion on the topics that should be included in the Manual, including the possibility of article 2 covering other taxes (for example, the Islamic zakat or the German "church tax") and the Committee's discussion of whether or not article 5, paragraph 3, of the United Nations Model Convention should be considered to represent a deeming provision for permanent establishment purposes.

71. Some participants supported a more concise Manual than others envisaged, believing that it should not be so comprehensive as to be difficult to reference and update. Mr. Bischel agreed that if an extensive and detailed treaty manual were proposed, there would be a risk that it would take too long to complete it and it would therefore not have the intended impact. He acknowledged that the Manual would have to be updated once the next version of the Model had been finalized. He further clarified that this work was a reflection of the work done and the guidance provided by previous subcommittees and working groups. He thanked participants for the suggestions and assured them that all the comments would be taken into account and incorporated as appropriate into any updated version of the paper.

72. **It was agreed that Mr. Crow and Mr. Bischel would confer with the coordinator of the Subcommittee dealing with the United Nations Manual, Mr. Arrindell, in order to discuss further what the members would like to see in the Manual. Both of them, and (in his absence) Mr. Brunetti, as well as other members of the Working Group, were thanked for their work by the Chair, who expressed the hope that they would continue to be closely involved.**

H. How treaties are developed: practical issues

73. Victor Thuronyi presented document E/C.18/2009/3, provided at the request of the Committee at its fourth session, which discussed a set of issues connected with the treaty negotiation process. The paper suggested that the Committee might, in accordance with its broad mandate:

(a) Review experience with use of the United Nations Model Convention in actual treaty negotiations, as well as the inclusion in treaties of provisions that were not found in the Model, to see whether they might be relevant to the Committee's work;

(b) Provide guidance to treaty negotiators on negotiation strategy;

(c) Consider how States might enhance their capacity to negotiate and administer treaties;

(d) Help countries develop a general strategy for negotiating treaties.

74. The paper suggested that a substantial expansion of the existing treaty network might not necessarily be desirable for many developing countries and that many of the effects of treaties might be achievable instead by adopting unilateral measures in domestic law. Finally, the paper suggested that more limited (what might be called "light") treaties, perhaps in a multilateral form, might be useful for some countries that did not have an extensive network of full double tax treaties or the ability in practical terms to achieve that within a reasonable time frame.

75. Several speakers commented that the paper addressed matters that were of particular concern to developing countries. There was general agreement that it was desirable for each country to negotiate treaties within the framework of an overall strategy, and for negotiators to resist, where possible, the conclusion of treaties for political reasons unrelated to tax administration or economic needs.

76. It was suggested that there would be value in the International Monetary Fund developing a study on the correlation between the flow of investment and the number of treaties, since the issue of the investment benefits of tax treaties was often raised without reaching clear conclusions.

77. No firm conclusion was reached on the question of whether a substantial expansion of the overall treaty network was desirable, reflecting in part the different positions that different States would be in, depending on factors such as level of development, size and attractiveness as an investment destination.

78. While it was acknowledged that unilateral measures could accomplish many of the benefits achieved by tax treaties, some speakers were sceptical of the possibility of expecting relief through unilateral measures alone, as they lacked the solemnity and apparent permanence of obligations undertaken by States under international law, which persisted through changes of Government or policy until renegotiated or, as rarely happened, terminated.

79. The concept of a "light" treaty or treaties drew some support, particularly on a regional basis, and in this respect one participant noted that in effect one model "light" treaty had been developed under the auspices of the Southern African Development Community (SADC). It fulfilled the role of an interim measure to allow for the exchange of information on a short-term basis rather than on a long-term basis. Other participants noted the experience of Caribbean countries (the Caribbean Community (CARICOM) Model) and the Nordic countries (the Nordic Model) and supported the idea that smaller countries located in the same region might enter into multilateral agreements because these countries would have very similar legislation and interests, and would have a stronger negotiating position through entering into a treaty together.

80. The discussion on the concept of a "light treaty" was widely regarded as necessary, but it was generally felt that it was too early to draw conclusions on how much could be accomplished by such treaties. In particular, several speakers raised questions about how much could be accomplished by a mutual agreement procedure if the substantive rules on the basis of which mutual agreement would have to be achieved were not included in the treaty. Others noted the difficulty of having a treaty suitable for groupings that lacked regional, size, level of development and other similarities.

81. There was, in any case, a general agreement on the usefulness of including in the Manual on Treaty Negotiation or on the website of the Committee a paper further elaborating on some of the considerations arising from the discussion; for example, the need for early establishment of a treaty negotiating strategy, particularly detailing the policy questions and what might be achieved by a tax treaty, as well as the need for ensuring capacity to negotiate and administer treaties. There was general interest in follow-up on issues addressed in the paper but given their wide scope, it was agreed that this would occur in due course in line with the Committee's priorities.

82. In this respect, Ifueko Omoigui-Okauru, the coordinator of the newly created Subcommittee on Capacity-Building, stated that many of the issues would need to be looked at by that Subcommittee, as capacity-building in treaty negotiation and the creation of international networks were issues that would need to be considered in that context. She noted the value of the present discussion in that respect.

83. After a thorough discussion of the subject, it was decided that the preparation of a paper on the issue would be a useful resource for the work of the Committee. The Committee decided that the issues warranted further discussion and should be considered by the Subcommittee on Capacity-Building. The Committee invited Mr. Thuronyi to further elaborate on the paper and also participate in, and contribute to, the discussions in the Subcommittee on Capacity-Building.

I. Dispute resolution

84. Claudine Devillet, whom the Committee had chosen as coordinator of the Subcommittee on Dispute Resolution, presented the issue of dispute resolution within tax treaties. She explained how the Subcommittee would address the issue with the goal of accelerating and facilitating the final agreement of disputes covered by tax treaties under the mutual agreement procedure. The work of the Subcommittee would cover two aspects:

(a) The different possible ways of improving the mutual agreement procedure;

(b) The possibilities offered by arbitration, including the questions that such a specific tool raises (including constitutional barriers and interaction with domestic legal remedies) and the different types of arbitration available.

85. Ms. Devillet noted that special consideration would be given to the specific needs with respect to transfer pricing dispute resolution, since many difficulties in dispute resolution occurred in relation to these often difficult cases. She also noted that the work of the Subcommittee would take into particular account the specific

needs and concerns of developing countries and countries in transition, in accordance with the mandate of the Committee itself.

86. Ms. Devillet indicated that two other Committee members, Wolfgang Lasars and Kwame Adjei-Djan, Jacques Sasseville of OECD, and Huub Bierlaagh, formerly of the International Bureau of Fiscal Documentation, would participate in the work of the Subcommittee. She asked other observers to indicate their interest in the Subcommittee's work and expressed the wish that representatives of developing countries could provide their special experience by participating in the Subcommittee's work. The following observers volunteered: Arnoldo Godoy (Brazil), Mustapha Kharbouch (Morocco) and Robert Couzin (International Chamber of Commerce Commission on Tax).

87. Mr. Couzin highlighted what were, in his view, the benefits of arbitration for developing countries, namely that it provided legal certainty to foreign investors and would require less human resources (which were more scarce in developing countries) than the managing of the mutual agreement procedure in the absence of arbitration. Others noted that there were issues for developing countries in terms of cost and ensuring that arbitrators and their decisions were sufficiently attuned to developing country realities, as well as in ensuring that cases could be presented as cogently by countries with limited resources as by those with greater resources.

88. **The Subcommittee will present a report during the next meeting of the Committee for further consideration and guidance. The Committee welcomed the possibility of a paper on this important issue.**

J. General issues in the review of commentaries of the United Nations Model Double Taxation Convention between Developed and Developing Countries

89. Liselott Kana, as coordinator of the previous Working Group on the Review of the Commentaries, introduced document E/C.18/2009/CRP.5. She explained that two tables were annexed to the paper: table I showed the quotations in the 2001 commentaries derived from the OECD Model Tax Convention of 1997, whereas table II dealt with the existing differences between both models. Both tables were in draft form only but had been prepared to give a background for the new membership of the Committee to be able to make decisions on how to take on board the update for the United Nations Model Convention.

90. Ms. Kana noted that the objective of the former Working Group and the Committee was to make the commentaries as unambiguous as possible, stating clearly the understanding of the Committee on how the United Nations Model Convention was to be understood, while explaining the different options considered by the Committee in the commentaries. She also emphasized that the focus of the group should probably be on facilitating guidance in the United Nations Model Convention where it differed from the OECD Model Tax Convention and where there was little guidance at present.

91. She noted that special care was needed in considering the currently reproduced OECD commentaries, since the most recent commentaries reproduced in the 2001 United Nations Model Convention had been based on the OECD Model Tax Convention of 1997 and had been subject to significant later modifications.

92. It was noted that Robin Oliver had been chosen to head the Subcommittee in charge of overseeing the wording of the 2011 update of the United Nations Model Convention and that the mandate of the Working Group on the Review of the Commentaries had been subsumed within the mandate of that Subcommittee.

93. Mr. Oliver then explained that in his view, it would be difficult to eliminate quotation of the OECD commentaries completely from the United Nations Model Convention as the task of rewriting those commentaries generally would be immense and unlikely to take place in practice. The allocation of such effort would not be justified by the potential benefits, nor would differing wording be justified where there was no difference in meaning. He noted, however, that there should be a complete study of the commentaries at the Committee level. Members should not agree in a generalized fashion to accept OECD commentaries, but should rather make clear which OECD amendments were being agreed with or disagreed with in particular cases, so that there was no question of following the changes to the OECD commentaries without a consideration at the Committee level of their acceptability or otherwise in the context of the United Nations Model Convention.

94. Some members expressed the view that the OECD commentaries could be accepted without paraphrasing the text itself and that any technical problems with that could be overcome.

95. It was suggested that the Committee might provide references to the OECD Model Tax Convention in force in the course of a specific year, without the extensive quotations used at present. This would allow the United Nations Model Convention to be a slimmer model with practical guidance only on the main issues, focusing on the main differences between the models. It would also mean that later changes to the OECD Model Tax Convention would clearly not implicitly be incorporated into the United Nations Model Convention commentaries.

96. In this respect, the Secretariat noted that one reason often given in the past as to why the United Nations Model Convention quoted so much of the OECD commentaries was that the OECD Model Tax Convention and commentaries were not, unlike the Internet version of the United Nations Model Convention, freely available, and the inclusion of extensive quotation was therefore a service to developing countries that also benefited both models by promoting consistent approaches where warranted. The Secretariat noted that this reasoning was perhaps not as strong as it used to be, as OECD frequently made its Model Tax Convention available to developing country representatives at no cost. This might provide the opportunity for a slimmer model that could be more easily updated and would meet the needs of all, especially of developing countries, at least as well as the current model.

97. **While the issue of how the OECD commentaries should be reflected in the United Nations commentaries was discussed thoroughly, the Committee could not reach a consensus on a general approach: some favoured a more comprehensive reflection of the OECD commentaries where it had been agreed as equally applicable to the United Nations Model Convention, or where there was a distinct disagreement, while others preferred less quotation when the two models and the interpretations of them were consistent. The issue will be further discussed during the sixth session of the Committee.**

K. Transfer pricing guidelines, including a manual and checklist for developing countries

98. The Deputy Secretary of the Committee, Michael Lennard, gave a presentation on the subject to the Committee, emphasizing that the proposed practical manual would not be intended to substitute the OECD guidelines on transfer pricing. The project was currently being developed in a spirit informed by the scope of the South-South Sharing of Successful Tax Practices (S4TP) project, a project involving the Special Unit for South-South Cooperation, New Rules for Global Finance Coalition and the Tax Justice Network, and therefore had the special focus of ensuring that lessons learned by developing countries in this complex area could be shared for the benefit of other developing countries.

99. The participants emphasized the need to provide real life examples, rather than theoretical examples that would not help the practical application of transfer pricing guidelines. The participants suggested greater emphasis on topics such as: (a) direct investments; (b) small and medium-sized enterprises; and (c) advanced pricing arrangements in the subject matter of the proposed manual.

100. It was noted that different approaches in this area would apply for different countries and that some groupings of different countries at a similar stage of their "transfer pricing journey" might promote a useful sharing of experiences. Many participants noted that their experiences in introducing transfer pricing rules might be of assistance in this process.

101. The possibility of categorizing countries into groups was discussed, in order to obtain data as to: (a) the number of staff members working in transfer pricing in the countries; (b) the status of development of transfer pricing rules; and (c) difficulties faced by the countries.

102. Some participants expressed the need to make available a version of the guidelines in Arabic. It was stated that there was currently no Arabic version of any transfer pricing guideline.

103. The idea of having areas of restricted (Government only) access within the guidelines was generally rejected by the participants. The need to have guidelines that would assist field officers in applying domestic transfer pricing rules was highlighted by a few participants, mostly from developing countries. The lack of qualified personnel to apply transfer pricing rules was also flagged by those present, as was the lack of necessary information, even where the skills existed. Tax administrators reported having special difficulty in providing: (a) a list of comparables; and (b) the treatment of intangible assets.

104. It was agreed by the members that the United Nations guidelines were to follow the main premises defined by the OECD guidelines on transfer pricing, and to assist countries in practical ways when following such guidance. It was acknowledged that there were difficulties in applying some of those guidelines in developing, and even developed, countries, as well as issues of the extent to which the guidelines reflected the practical realities of the way in which methodologies were applied. It was noted that it would be up to the Committee to address this in a way that could be effectively implemented in developing countries. The main aim was for the manual to provide an explanation to developing countries of how to

apply the "arms length principle" and to help them apply it in their situations and protect their legitimate taxing rights.

105. The participants also discussed the possibility of the United Nations providing transfer pricing training for less experienced countries or of experienced countries providing training and guidance to such countries. Another suggestion was for a country to host a training session, inviting United Nations representatives as well as country officials. One Committee member, Ifueko Omoigui-Okauru, said Nigeria would probably be in a position to host one of these training sessions. Ronald Van der Merwe reported that for the past few years South Africa had been inviting other African countries and hosting workshops on transfer pricing and other international tax issues, using OECD experts. He raised the possibility of extending invitations to more African countries, in particular members of the African Tax Administration Forum, and suggested inviting United Nations officials to talk about transfer pricing as well. Others noted that there were many experienced transfer pricing experts willing to assist developing countries in dealing with the complex issues of transfer pricing, although it was acknowledged that such experts had to be sensitive to local conditions and priorities.

106. The Secretariat noted that an Expert Group meeting on transfer pricing would be held in January 2010 in New York. While not a Subcommittee meeting, it would assist the Subcommittee in its work.

107. **The Committee acknowledged the importance of having a practical transfer pricing manual that would be tailor-made to the needs of developing countries, with their input and priorities fully incorporated, but recognizing that transfer pricing capability was a "journey" and different countries were at different stages in that journey at different points in time. The formulation of transfer pricing guidelines would be one of the Committee's main priorities for the year. The Committee further agreed to look at the issue of assisting in arranging training sessions during the following year. It was suggested that there could be an interface between the Subcommittee on Transfer Pricing and the Subcommittee on Capacity-Building. The Chair thanked the United Nations Secretariat for their work in this area.**

L. Other substantive issues

108. The following other issues were raised in the course of the Committee's discussions on its mandate and future work:

Capacity-building

109. **On the subject of capacity-building and technical assistance more generally, the need for technical assistance and capacity-building from a United Nations perspective was noted several times during the annual session, and the Secretariat indicated that the funding for United Nations technical assistance and capacity-building continued to be a problem: there was still no dedicated funding for such tax-related activities. It was noted that Viet Nam and Pakistan had, for example, generously offered to host regional events, but funding for the cost of ensuring sufficient developing country participation, particularly the cost of air fares, would still have to be found before such events could occur.**

110. Donors were urged once again to contribute to the United Nations Tax Trust Fund. The Secretariat had decided to explore the possibility of partnering with bodies such as the International Bureau of Fiscal Documentation on providing training events of benefit to developing countries: in 2008 the costs of participation for a number of representatives from such countries at an International Bureau tax treaty negotiation course addressing both the United Nations and OECD models had been provided using United Nations resources, and the International Bureau had waived the fees for the course for the participants. A similar course would be held in January 2010, with the International Bureau willing to waive course fees again. While it was unlikely that the United Nations could pay travel and accommodation expenses directly for that course, the Secretariat was actively seeking a donor. Ultimately, assistance was provided by the development arm of the Government of Germany.

111. The Secretariat was also open to the possibility of partnering with OECD in organizing an event, if a suitable vehicle could be found. The Secretariat noted that the Asian Development Bank Institute had also organized a very unique and successful course on tax treaty issues, at which both the United Nations and OECD Secretariats had explained their models. Norway had also recently assisted not just in bringing to fruition the orientation meeting of members of the Committee, but also in facilitating the participation of some members in a very helpful International Bureau of Fiscal Documentation course after the August members' orientation meeting kindly hosted by the International Bureau.

112. Mr. Montes, the Secretary of the Committee, had held talks with the development arm of the Government of Germany, which might result in further partnerships in this area, and which had led to the assistance noted above. The Secretariat had also continued its productive partnership with the Special Unit on South-South Cooperation of the United Nations Development Programme and two non-governmental organizations (the New Rules for Global Finance Coalition and the Tax Justice Network) on South-South sharing of successful tax practices.

113. It was noted that States (China, South Africa, Norway) hosting subcommittee meetings had ensured that some important work could be done by these subcommittees, and also that some States, such as Malaysia, had programmes for which they assisted with participation in the training. Other members noted their countries' efforts in this regard and Jan de Goede of the International Bureau of Fiscal Documentation announced that the International Bureau would be jointly sponsoring with the United Nations, and perhaps others, a major tax conference in Asia in 2010. The Secretariat thanked the International Bureau warmly for its vision: this would be the first such United Nations technical assistance event in taxation since 2002.

Tax and environment issues

114. **The Committee also requested a Secretariat paper on opportunities for tax cooperation to assist in dealing with major environmental issues — with a particular focus on climate change, following a presentation by the Secretariat.**

115. The Secretariat noted that this type of tax cooperation was an emerging issue, as both carbon taxes and carbon trading regimes involved considerable tax issues that might impact on the effectiveness of such responses because of double taxation or uncertainty about taxing events and allocation of taxation rights between

countries (for example, on internationally bought and sold trading rights or carbon-derivatives). It was noted that it was important that lack of tax cooperation should not adversely affect responses to climate change in particular, but instead enhance their effectiveness. It was agreed that although the Committee agenda was already very full, there should be some consideration of whether this was an important area for enhancing cooperation and playing a part in addressing a major global challenge.

Chapter IV
Dates and agenda for the sixth session of the Committee

116. In view of its consideration of its priorities, and the discussions during the fifth session, the Committee decided upon the following draft agenda for the sixth session:

Draft agenda for the sixth session of the Committee

1. Opening of the session by the Chair of the Committee.
2. Adoption of the agenda and organization of work.
3. Discussion of substantive issues related to international cooperation in tax matters:
   - (a) United Nations Model Tax Convention update;
   - (b) Dispute resolution;
   - (c) Issues related to attribution of profits under article 7 of the United Nations Model Convention;
   - (d) Transfer pricing: practical manual for developing countries;
   - (e) Article 13: capital gains taxation of development projects;
   - (f) Exchange of information;
   - (g) Tax treatment of services;
   - (h) Article 14 of the United Nations Model Convention;
   - (i) Definition of permanent establishment: proposed revised article 5 commentary;
   - (j) Concept of beneficial ownership;
   - (k) Revision of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries;
   - (l) Capacity-building;
   - (m) Tax cooperation and its relevance to major environmental issues, particularly climate change;
   - (n) Tax competition in corporate tax: tax incentives that have worked and not worked in attracting foreign direct investment.
4. Dates and agenda for the seventh session of the Committee.
5. Adoption of the report of the Committee on its sixth session.

117. **The Committee decided to hold its sixth session in Geneva from 18 to 22 October 2010.**

Chapter V

Adoption of the report of the Committee on its fifth session

118. The Committee approved and adopted the present report for submission to the Economic and Social Council.

Annex

Proposed code of conduct

United Nations code of conduct on cooperation in combating international tax evasion

Preamble

Acknowledging that tax systems are a key means of mobilizing domestic public resources and enhancing macroeconomic policies, as well as the need to step up efforts to enhance the ability of each State to collect tax revenues, efficiently and effectively combat tax evasion and protect their tax bases from non-compliance with their tax laws,

Acknowledging the importance of supporting national efforts in these areas by enhancing international tax cooperation,

Acknowledging that international tax evasion has become increasingly detrimental to development as globalization has extended to all parts of the world,

Acknowledging that the tools of tax evasion have accompanied globalization and that they are undermining the ability of developing countries to mobilize domestic resources for development,

Acknowledging, therefore, the need for a code of conduct in combating international tax evasion,

Emphasizing that the code of conduct is a political commitment and does not affect the rights and obligations of States or their respective spheres of competence,

Emphasizing that the code of conduct is a practical means of enhancing international tax cooperation to an acceptable level but that individual States should aspire to a higher level of cooperation to the extent their circumstances allow.

The Committee of Experts on International Cooperation in Tax Matters hereby adopts the following code of conduct:

I. Scope

This code of conduct applies to States, including Government agencies, and extends to tax laws, regulations and administrative practices.

II. Goals

The code of conduct has the following goals:

(a) To ensure that all States, in an effort to combat international tax evasion, and to protect their tax bases from non-compliance with their tax laws, provide that high levels of transparency and exchange of information in tax matters are adhered to, and in particular, are able to supply bank information and information about beneficial owners of income and assets;

(b) To assist in the development of international norms and practical steps that Governments should follow to cooperate to avoid and combat international tax evasion and protect their tax bases from non-compliance with their tax laws.

III. Commitments

Under this code of conduct States commit to:

(a) Effectively exchange information in both criminal and civil tax matters;

(b) Ensure there are no restrictions on information exchange caused by application of the dual criminality principle or a domestic tax interest requirement;

(c) Have appropriate confidentiality rules for information exchanged and safeguards and limitations that apply to taxpayer information;

(d) Ensure that reliable information is available, in particular, bank account, ownership, identity and relevant accounting information, with powers in place to obtain and provide such information in response to a specific request.

These commitments are to be implemented by the following actions:

(a) Unilateral actions: the national implementation of these standards may require that countries amend their domestic legislation and practices;

(b) Bilateral, or as appropriate multilateral, including regional, actions: the principles of transparency and effective exchange of information will generally be implemented through bilateral agreements implementing the substance of article 26 and the accompanying commentary on the United Nations Model Tax Convention, as finalized by the United Nations Committee of Experts on International Cooperation in Tax Matters in 2008.

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